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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring	MM Docket No. 92-260 DOCKET FILE COPY ORIGINAL

COMMENTS

Marcus Cable Co, American Cable Entertainment, Greater Media Inc., Cable Television Association of Maryland, Delaware and the District of Columbia, Cable Television Association of Georgia, Minnesota Cable Communications Association, New Jersey Cable Telecommunications Association, Ohio Cable Telecommunications Association, Oregon Cable Television Association, South Carolina Cable Television Association,Tennessee Cable Television Association, Texas Cable TV Association ("Joint Commenters"), hereby submit their comments in response to the Commission's Further Notice of Proposed Rulemaking ("FNPRM") in the above captioned proceeding.[1]

[1] In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, FCC 95-503 (released Jan. 26, 1996).

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The issues raised in the FNPRM are substantially similar to those raised in the Notice of Proposed Rulemaking released by the Commission in CS Docket No. 95-184 ("NPRM") , where the Commission proposes, among other things, to move the demarcation point for inside wiring in MDUs to a point near where the cable enters the building. The Joint Commenters have filed detailed comments in response to that docket, and as a matter of administrative convenience, incorporate by reference their Comments submitted in that proceeding.

The Commission's proposal to allow a building to terminate franchised cable service if all subscribers agree is fraught with mischief. As explained in our Comments, landlords and developers have demonstrated that they do not act to promote competition for their residents. Rather, their practice has been to choose the provider that is willing to pay the highest premium for the right to serve the building, even if state statutory law prohibits such a payment. The Commission's proposal would allow these entities to evict the cable operator without regard to consumer choice, and without regard to competition. The Commission should not strengthen the power of the landlords and developers to act as a bottleneck restricting competitive service to residents.

Likewise, the Joint Commenters ask the Commission to clarify that by its statement in paragraph 18 of the First Order on Reconsideration that included the FNPRM, it did not intend to empower landlords or competitors to evade any requirements that emerge from the NPRM and FNPRM. Indeed, without clarification, the Commission's statement in paragraph 18 that it does not "intend to prohibit a subscriber from delegating to an agent the task of terminating service and authorizing the purchase of home wiring on his or her behalf" could lead to all of the same problems identified in the Comments.

If the Commission concludes that it will nevertheless give building owners, managers and developers the right to purchase inside wiring, it must do so on conditions that seek to protect the residents. It must prohibit exclusive arrangements that lock in an unfranchised service provider, or which limit subscriber choice of a franchised provider. It must provide that any "selection" process include the clear and fair vote of residents, free from any coercion or pressure from the landlord/developer. Such elections must not allow the landlord to profit from the process, or to restrict the ability of interested competitors to campaign for votes. In short, the Commission must not allow these real estate professionals to use their position to determine the outcome of any selection process.

Respectfully Submitted,

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March 18, 1996

Before the
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Washington, D.C.

In the Matter of Telecommunications Services Inside Wiring Customer Premises Equipment	CS Docket No. 95-184

COMMENTS

Marcus Cable Company;
American Cable Entertainment;
Greater Media, Inc.;
Cable Television Association of Maryland, Delaware and the District of Columbia;
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INTRODUCTION AND SUMMARY

The Commission's proposal to move the demarcation point for cable wiring in MDUs to the multi-user terminal cannot be reconciled with the Telecommunications Act of

[1] In the Matter of Telecommunications Services Inside Wiring, Notice of Proposed Rulemaking, CS Docket 95-184, FCC 95-504 (released Jan. 26, 1996) ("NPRM").

1996.[2] The Commission's proposal would directly conflict with Section 652(d), which allows a local exchange carrier ("LEC") to use a cable operator's facilities extending from the last multi-user terminal to subscribers' premises only with "the concurrence of the cable operator on the rates, terms and conditions" of such use. Any rule that would allow LECs to demand access to facilities located in the common areas of MDUs would nullify Section 652(d). Moreover, the Commission's proposal would divest cable operators of their existing facilities used to reach MDU subscribers, and thus conflict with the Act's general preference for facilities-based competition by placing barriers to cable operators' entry into telecommunications services markets. The Commission should adopt a rule stating that the demarcation point for all broadband facilities is 12 inches outside an individual consumer's premises, *i.e.*, an individual residence unit within an MDU.

In addition, altering the definition of the demarcation point in MDUs for cable will not benefit consumers, but rather perpetuate the status of landlords and developers as self-interested gatekeepers. The historical and on-going impediments imposed by landlords and developers to cable operators' access to consumers are well documented. Despite state and federal laws designed to curb such practices, landlords and developers continue to resist cable operator efforts to reach subscribers in MDUs. Altering the definition of the demarcation point in MDUs will only serve to further empower these entities, who in turn will continue to act without regard for the interests of their consumer-tenants.

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[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act" or "Act").

I. IT IS INCONSISTENT WITH THE 1996 TELECOMMUNICATIONS ACT TO ESTABLISH A DEMARCATION POINT FOR MDU WIRING AT THE POINT OF ENTRY

The ultimate thrust of the NPRM is that the Commission's rules should take from cable operators control over an important and expensive portion of their plant in the belief that consumers might someday benefit. The Commission's approach, however, is inconsistent with the policy and provisions of the 1996 Act, and neither consumers nor competition will benefit.

In the NPRM, the Commission proposes to "move" the demarcation point for cable inside wiring in MDUs from 12 inches outside subscribers' premises to a point consistent with the demarcation point used for telco inside wiring — presumably, the multi-user terminal (a tap) at the point of entry that in turn directs signals to residents of the MDU.[3] The Commission asserts that moving the demarcation point in MDUs to the multi-user terminal would facilitate competition, both for services provided over such facilities and for the wiring itself.[4] In that respect, however, the Commission is mistaken. The overriding purpose of the 1996 Act is to promote facilities-based competition. To reach that goal, the Act includes a provision addressing the ownership and use of cable operators' facilities extending from the multi-user terminal to subscribers' premises. The Commission's proposal to wrest away from cable operators ownership over the wiring extending from multi-user terminals to individual subscribers' units would diminish the likelihood of facilities-based

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[3] NPRM, ¶¶ 16-17.

[4] See NPRM, ¶¶ 14, 43.

competition and serve as a barrier to cable operators' entry into other service markets. The Commission's proposal thus conflicts with both the purpose of the Act and its explicit provisions.

A. The Commission's Proposal is Contrary to the Plain Language and The Intent of the 1996 Act That Cable Operators Retain Ownership And Control Of The Wires From The Multi-user Terminal To Subscribers' Premises

Congress could not have expressed its preference for facilities-based competition more strongly than it did in the 1996 Telecommunications Act. The 1996 Act prohibits state and local barriers to cable delivery of telecommunications services and lifts the ban on LEC delivery of cable services. But while Congress chose to allow LECs to provide video programming services directly to subscribers within their telephone service areas, the Act generally prohibits LECs from purchasing or managing co-located cable systems, and vice versa. Indeed, so intent was Congress on promoting a "two-wire" world that it specifically requires cable operators to retain control of their wiring to customer premises.

Section 652(d)(2) of the new Act presents a narrow exception to the general prohibition on telco-cable joint ventures. Under the exception, a LEC may use a cable operator's facilities extending from the multi-user terminal to subscriber premises, but only for a limited time and scope, and only with "the concurrence of the cable operator on the rates, terms, and conditions." In order for them to concur on rates, terms, and conditions, however, cable operators must retain ownership and control over their facilities extending from the multi-user terminal to subscribers' premises — that is, the very MDU inside wiring which the

Commission seeks to divest in this rulemaking. But Congress clearly intended that new competitors, LECs in particular, construct facilities extending all the way to subscribers' premises. H.R. Rep. No. 204, 104th Cong., 1st Sess. at 103 (1995) (stating that the reasonableness of the scope and duration of joint use agreements must be measured in light of "the underlying policy goals of this legislation: to promote competition both in services and facilities, and to *encourage long term investment in the infrastructure*") (emphasis added).

The Commission's proposal to change the demarcation point in MDUs to the multi-user terminal is inconsistent with the 1996 Act's goal of facilities-based competition in two ways. First, LECs would avoid making the upgrades to their facilities necessary to provide facilities-based competition for video services to residents of MDUs. Instead, the LEC would simply displace the cable operator and use the wiring installed by the cable operator to reach the subscribers' premises, contrary to Congress' express instructions.

Second, the Commission's proposal would effectively preclude cable operators from providing competition in MDUs for telecommunications services, by divesting them of the very wire with which they seek to provide telecommunications services. A cable operator cannot compete to serve MDU residents if it no longer has the use of the inside wiring necessary to serve them. Under the proposed change in demarcation point, LECs will gain free access to facilities they need to provide video services, while simultaneously presenting a barrier to cable operators' entry into the LECs' monopoly telephone and telecommunications markets. The Commission must not facilitate such an unfair and anticompetitive scheme to defeat Congress' intent

B. Present Technology Precludes Joint Use of the Same Inside Broadband Wire

The Commission assumes that there may be two providers using the same wire to reach residents. In fact, it is technologically and economically infeasible for dual providers to use a single coaxial cable drop. Current models for telecommunications networks strive to reduce the number of active electronic components so as to improve signal quality and reliability. By contrast, the shared use of a single broadband wire by different service providers requires the addition of several active electronic components (modulators, demodulators, splitters, and combiners) for each subscriber within the building. This in turn increases the potential sources of signal failure and degradation, and materially increases the cost to each provider. The ultimate result would be diminished service to the consumer and at a higher cost. Congress adopted a preference for new entrants to construct separate facilities, and the Commission should design its regulations to promote this result.

C. The Commission Should Define The Demarcation Point For All Broadband Facilities To Be The Same As The Present Demarcation Point For Cable Systems

In the NPRM at ¶14, the Commission asked whether it should define demarcation points based on whether the facilities (not the services being provided) are broadband or narrowband. The Joint Commenters submit that the Commission should define demarcation points based on the nature of the facilities.

Broadband facilities, regardless of the services being provided over them, should have a demarcation point defined as 12 inches outside individual subscribers' units. The addition of voice traffic using a few kilohertz of bandwidth to existing facilities that transmit hundreds of megahertz of bandwidth containing video programming (and that also contains voice) does not change the fundamental nature of the facility. The Commission has previously recognized that different wire technologies should receive different regulatory treatment (*e.g.*, simple and complex telephone wiring), and it would be entirely consistent for the Commission to apply that same insight again in this instance.

II. THE COMMISSION'S PROPOSAL TO DEFINE THE DEMARCATION POINT IN MDUs AT THE POINT OF ENTRY THREATENS TO REINFORCE THE GATEKEEPING POWER OF LANDLORDS AND DEVELOPERS TO THE DETRIMENT OF CONSUMER CHOICE

A. Landlords And Developers Are Not Promoting Consumer Choice

In the NPRM, the Commission recognizes the critical issue underlying its treatment of inside wiring in MDUs, but poses the question only in passing: "who [is] the 'customer' [] -- the landlord or the tenant. . . ."[5] In the context of cable and other video services, the answer is the tenant. The landlord or developer, by contrast, will generally be promoting its own economic interest, often at the expense of customers.

[redacted]

are clear and well documented.[6] Landlords and developers erect substantial barriers against allowing cable operators to wire MDUs or private residential developments, by manipulating easements, delaying the release of dedicated easements, or litigating against access unless the operator pays a toll. Others have evicted franchised cable operators in order to provide *exclusive* access to an affiliated SMATV provider or one which promises a kickback to the developer.[7]

One classic example will demonstrate that this is not a competitive contest which benefits the customer. In C/R TV Cable, Inc. v. Shannondale, Inc., 27 F.3d 104 (4th Cir. 1994), the developer sought to exclude the franchised cable operator from the planned community, despite the residents' desire to obtain service from the franchised operator. The provider favored by the developer would have charged $30.20 for basic service, while the

[6] Landlords and developers have not generally imposed such conditions on telephone or electric companies because there has been no feasible alternative to their services. And since landlords and developers could not successfully market their space without offering essential telephone and electric service, the landlords and developers were quick to accommodate telephone and electric utilities. This differential treatment in access has had, and will continue to have, a significant competitive impact to the detriment of cable operators, new entrants, and ultimately MDU consumers.

[7] See, e.g., Multichannel TV Cable v. Charlottesville Quality Cable, No. 93-0073-C (W.D. Va. Dec. 3, 1993), aff'd, 22 F.3d 546 (4th Cir. 1994)(franchised operator obtained injunction against landlord's eviction efforts in favor of SMATV operator that paid the landlord "a kickback"). The standard procedure for some SMATV companies is to pay off the landlord, to sign an exclusive contract with the landlord, and then appropriate the cable operator's existing wiring to facilitate its service. Only the landlord and wireless or SMATV operator profit from such arrangements — competition and consumer choice are the losers.

franchised operator charged only $17.40.[8] The non-franchised operator, however, had promised to provide a kickback to the developer.[9] Numerous other cases chronicle landlords' and developers' similar attempts.[10] These cases teach a critical lesson: giving landlords and developers even more power — which is what changing the demarcation point in MDUs would do — will not benefit consumers.

B. Cable Operators Have Had Limited Success In Achieving Access Under State And Federal Laws

Cable operators usually are willing to place their own wiring into MDUs already being served by a SMATV, and thus provide facilities-based competition. Landlords and developers, however, often fiercely oppose such access, in order to protect the kickbacks they receive from exclusive arrangements. Cable operators have had only limited success in obtaining access. Early favorable interpretations of Section 621's access to easements clause have largely been eroded in the federal courts.[11] Common law apportionment of easements is

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[8] C/R TV Cable, Inc. v. Shannondale, Inc., Civ. Action No. 92-0017-M, Plaintiff's Reply Memorandum of Points and Authorities in Support of Its Motion For A Preliminary Injunction at 51 (Apr. 23, 1992).

[9] C/R TV Cable, Inc. v. Shannondale, Inc., 27 F.3d 104 (Jt. App., Vol. II, p. 714).

[10] Storer Cable TV, Inc. v. Summerwinds Apartments Assoc., 493 So. 2d 417 (Fla. 1986); Waltham Telecommunications v. O'Brien, 532 N.E.2d 656 (Mass. 1989); City of Lansing v Edward Rose Realty, 502 N.W.2d 638 (Mich. 1993); Centel Cable Television Co. v. Admiral's Cove Associates, 835 F.2d 1359 (11th Cir. 1988); UACC-Midwest, Inc. v. Occidental Development, Ltd., 1991 US Dist LEXIS 4163 (W.D. Mich. March 29, 1991); Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169 (4th Cir. 1993).

[11] See, e.g., Media General Cable of Fairfax, Inc. v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169 (4th Cir. 1993); Centel Cable Television Co. v. Admiral's Cove Assocs., 835 F.2d 1359 (11th Cir. 1988).

available in some jurisdictions, but primarily in the non-MDU context, such as sharing utility poles in the back yard of a single family home.[12] Several states have sought to remedy the problem by enacting legislation affirmatively granting access, and/or forbidding landlords from accepting any form of payment in exchange for access to premises.[13] Two states have enacted legislation providing that a dispute over the amount of compensation to be extracted by a landlord shall not delay the cable operator's installation of facilities in an MDU.[14] But these laws cover only a small minority of jurisdictions, leaving developers and landlords, in most cases, with the upper hand in denying competitive choices to their residents.

The Commission must, therefore, adopt rules that minimize, not maximize, the power of landlords, developers, and other private gatekeepers to deter or prohibit cable operators' and other new video providers' access to the ultimate consumers in MDUs. In the present circumstances, changing the demarcation point in MDUs would make no sense unless the Commission at the same time were to right the competitive imbalance, and condition the application of the new demarcation rules on a guarantee of nationwide access to premises.

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[12] C/R TV, 27 F.3d 104.

[13] See, e.g., Conn. Gen. Stat. § 16-333A(a); Va. Code Ann. § 55-248.13:2; 26 Del. Code § 613 (1994); Kan. Stat. Ann. § 58-2553(a)(5) (1994); D.C. Code § 43-1844.1; Wis. Stat. § 66.085(2). R.I. Gen. Laws § 39-19-10(d); 65 ILCS 5/11-42-11.1 (1993); see also NYT Cable TV v. Homestead at Mansfield, Inc., 518 A.2d 748 (N.J. Super. 1986), aff'd, 543 A.2d 10 (N.J. 1988).

[14] Conn. Gen Stat. § 16-333(A)(f); R.I. Gen. Laws § 39-19-10(g).

CONCLUSION

The Commission's proposal to move the demarcation point for cable television inside wiring from the individual residential apartments to a point near the location at which the cable wire enters a multiple-dwelling building should be rejected. The plain language of the Telecommunications Act of 1996, and its overriding policy in favor of facilities-based competition, require that cable operators be permitted to retain ownership of the wire necessary to provide cable and telecommunications services to apartment residents. The Commission's proposal would harm, not promote, competition for services to residents. It would favor the interests of landlords and developers, who have demonstrated their desire and willingness to enter exclusive service contracts with the entity that is willing to pay them the highest fees, without regard to the rates or service provided. The Commission should retain, therefore, its current demarcation point, and limit the power of developers and landlords to control the cable and telecommunications services offered to building residents.

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